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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1945.

No. 1114

THE CUDAHY PACKING COMPANY, A MAINE  
CORPORATION,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.**

VINCENT O'BRIEN,

JOHN MERRILL BAKER,

*Attorneys for Petitioner.*



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*Petitioner,*

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THE UNITED STATES OF AMERICA,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI.**

*To the Honorable the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Now comes The Cudahy Packing Company, a Maine corporation, and respectfully asks that a writ of certiorari may issue to the United States Circuit Court of Appeals for the Seventh Circuit to review the decision in the above-entitled cause and, in support of its petition, respectfully shows unto your Honors the following:

STATEMENT OF THE MATTER INVOLVED.

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Petitioner paid \$293,733.38 floor stocks taxes on its pork inventory of November 5, 1933. It also paid \$14,448.70 floor stocks taxes on wheat, field corn and sugar used in the processing of its pork products, and on cotton and jute used in the wrapping thereof (R. 77, 78, 111). On that part of the inventory subsequently sold to charitable institutions or exported, petitioner obtained refunds aggregating \$24,595.65, leaving a balance of \$283,546.43 unrefunded.

After *United States v. Butler*, 297 U. S. 1, invalidated the tax, petitioner filed, on June 30, 1937, a claim for refund on printed PT Form 76, as required by paragraph 2 of Section 914 of Title VII of the Revenue Act of 1936 (R. 24). All the data called for by the claim and the attached schedules A to E were given with the exception that schedule D, which by the printed instructions thereon directs the claimant to list each document, exhibit, statement of facts and other evidence submitted with the claim and relating to the non-shifting of the burden of the tax, was left blank (R. 24-29).

With the printed PT Form 76 there was forwarded to the Commissioner the affidavit and a letter of John F. Gearen, Jr., the secretary and chief accounting officer of claimant (R. 35-45).

The affidavit set forth facts showing:

1. That claimant paid the floor stocks taxes.
2. That it did not shift the burden of the amounts paid in any of the ways specifically mentioned in Section 902, and that there was no agreement by which it might do so, that is to say, that it did not "legally" shift the burden of the tax.

3. A detailed description of petitioner's method of operations and accounting as to hog products to show that neither the exact cost nor selling price of the inventory was ascertainable. No specific facts were set forth in the affidavit itself to support the averment of the claim that claimant had not shifted the burden of the tax indirectly in any manner whatsoever, from which it could be determined whether the economic burden of the tax had or had not been shifted in the sale of the inventory.

However, in the letter accompanying the claim and the affidavit, Mr. Gearen, among other things, said:

"We request that this letter be also regarded as a part of each claim and that the various items specified in this letter and in each of its detailed parts be regarded as being included by reference as a part of said claim." (R. 36.)

. . . . .

"It is of course obvious that the detailed evidence in connection with the several transactions, beginning with the purchase of the live hogs and ending with the final disposition of the products derived therefrom, is impossible to be transmitted with this claim. It is furthermore obvious that for the purpose of audit it is far more practical, convenient, and would be productive finally of a correct finding if the original records, copies, reports, tests and other calculations are allowed to remain with the Company at its regular places of business where, during any audit or other procedure, such records may be immediately available to auditors for the Treasury Department as well as for the Company's own accountants and audits. And all such records are freely tendered herewith for the most adequate and complete inspection, investigation, and copying in so far as this may be deemed necessary to finally determine the validity of the several items." (R. 37-38.)

The Commissioner accepted the tender of facts as made

in Mr. Gearen's letter and sent his auditors, in charge of Mr. Freeman Morgan, to the offices, plants and branches of petitioner to examine the books and records relating to the claim (R. 149). They commenced the examination in August of 1937 and finished in December of the same year (R. 150). They were given access to all of the books and records of petitioner relating to its claim for floor stocks tax refund. They examined the weekly hog cutting test sheets from the Omaha, Kansas City, Sioux City, St. Paul, Wichita and Los Angeles plants (R. 150). They examined the departmental financial statements for the fiscal years from 1931 through 1936. They examined all of the daily sales tickets for the months of November and December, 1933, from the South Chicago branch and from the Omaha, Sioux City and Kansas City plants. They also inspected the corporate minute books from 1932 through 1936 (R. 151, 161). When they had finished their examination, they left with the Company a copy of their notes which were a voluminous set of papers (R. 150).

At no time thereafter did the Commissioner request petitioner to furnish any further data relating to its claim, nor did he ever complain of the form in which the facts had been furnished to him (R. 153). On the contrary, hearings were held upon the merits of the claim by the Commissioner in his office in Washington on various dates in September and October, 1938, and in April and May, 1939, which were attended by officers and counsel representing the claimant and also by the Commissioner and many of his representatives, including Mr. Freeman Morgan and other economists and attorneys (R. 154, 155).

The hearings concerned not only the floor stocks tax claim but also the petitioner's claim for refund of processing taxes and the Government's counterclaims for deficiencies for income taxes. The Government's method of computing the amounts of refunds to which the petitioner was

entitled and its method of computing amounts claimed to be due from the petitioner for income taxes was reviewed.

At the last of the conferences, Mr. Gallahan, representing the Commissioner, gave Mr. Gearen a memorandum showing the result of the Government's determination of the net amount of the deficiency due to the Government, in which there was set forth as a credit for floor stocks taxes \$160,000 principal and \$51,200 interest accrued thereon as of 1939. The petitioner did not accept the Government's figure nor settle on that basis (R. 220, 156-158).

The Commissioner never allowed or rejected the claim but retained it without decision for 29 months, whereupon suit was brought in the United States District Court on December 4, 1939 (R. 162).

Respondent, in response to petitioner's request, made pursuant to Rule 36 of the Rules of Civil Procedure, admitted in writing the truth of the following matters of fact averred in the complaint, to-wit:

"Thereupon Commissioner sent his accountants and agents to the principal office of plaintiff at Chicago, Illinois, and to various other plants, branch houses and offices of plaintiff throughout the United States and there made extended examinations of the books, records and accounts of plaintiff as to all the records and facts bearing upon the payment by plaintiff of said 'floor stocks taxes', and upon plaintiff's claim for refund thereof.

"After said examinations were made, a number of hearings were held in the office of the Commissioner of Internal Revenue at Washington, D. C., upon the merits of said claims.

"These were attended by the Commissioner and by various of his assistants. Officers and attorneys of plaintiff also attended the said hearings and presented evidence and arguments on said claim." (R. 147, 148.)

At the trial the following material, uncontroverted facts were established:

It was impossible to determine the cost of the inventory or the prices at which it was in fact liquidated (R. 152, 165-168; 171-172, 174, 267, 302-303, 375-376).

In addition to the investigation made before suit by Freeman Morgan and others for the Commissioner of Internal Revenue, there was an investigation made shortly after the complaint was filed by Murray T. Morgan, a brother of Freeman Morgan, at the request of the Department of Justice. Murray T. Morgan had a wide experience in the packing industry and was chief of the Meat Purchase Division of the Livestock and Meat Branch of the War Food Administration at the time he testified (R. 359). With the assistance of seven or eight auditors and clerks, he worked continuously from January of 1940 into May of 1940 (R. 372) investigating the books and records of the petitioner at its general offices and plants (R. 57-58, 162-163) to make an approximation of the value of the inventory in question immediately prior to the date of the imposition of the tax and an approximation of the sales realization from that inventory.

He determined the value of the inventory as of November 4, 1933, by converting it as of that date into the form into which his experience and an examination of the Company's records led him to believe the petitioner had ultimately sold it out according to past practices, and by applying the average prices received by the Company for the week ending November 4, 1933, as shown by the Company's sales reports which were kept on a weekly basis. (R. 375, 378, 379, 384.)

Mr. Morgan then determined the liquidation time which he judged to be required for manufacture, transportation and sale through the Company's several channels of distribution of the various inventory items (R. 378-379). The inventory contained fresh cuts which would be promptly sold as fresh meats. The great bulk of the inventory, how-

ever, consisted of hams and bellies which were or were to become ultimate products, *i.e.*, smoked or cooked hams and bacon. As to a small portion of the poundage, such processing had been completed, but the major poundage was in the early stages of processing and it would require as much as three months to complete the processing before the items were available for sale (R. 113). Plaintiff's Exhibit 22 shows the respective liquidation periods so determined by Mr. Morgan (R. 459). Mr. Morgan determined the weekly prices obtained by the petitioner for similar products during the respective liquidation periods. (R. 453.) Mr. Morgan assumed that a uniform quantity of each item was sold each week during the liquidation period required for that item at the average weekly prices obtained by petitioner for that item through the respective channels of distribution.

By this method Mr. Morgan concluded that the inventory was sold for \$50,913.85 more than its value on November 4, 1933, without taking the tax into consideration (R. 427). Adding the tax of \$283,586.43 to the inventory value the day before the effective date of the tax, the petitioner, on the basis of Mr. Morgan's determination, sold the inventory at a loss of \$232,672.59 (R. 76).

The market prices of the inventory items in the form in which they were ultimately sold increased on Monday, November 6, 1933, the effective date of the tax, by the amount of the floor stocks tax. This was established by the following statement contained in the issue of the daily market service of the National Provisioner dated November 6, 1933, reading:

"The market opened full steady on green hams by a full cent higher than the previous closing figures due to the addition of the Federal tax."

and by the testimony of Mr. Morgan that that was his observation, too, with respect to the most important pork items (R. 368-370).

Since a rise of one cent was equivalent to the amount of the tax, the court found as a fact that the market prices were, on the date of the imposition of the floor stocks tax, increased by the amount of the tax (R. 473).

The Government offered no evidence to show that such increase in market prices was maintained beyond the imposition date of the tax, nor did the trial court make any finding that it was. The fact is that not only was the increase in prices not maintained throughout the period during which the major portion of the inventory was liquidated but that the increase was almost immediately lost because the public refused to absorb the tax. This is shown, in part, by a later issue of the daily market service of the National Provisioner for December 8, 1933, which the petitioner put in evidence and which in summarizing the market reactions and performance for November, 1933, said:

"Considerable increases in hog slaughter during November over that of October, continued weak buying power and a generally uncertain condition due to the processing tax and its increase on December 1 resulted in general weakness in the market for both fresh and cured pork meats. The total of all meats on hand at the end of the month recorded an increase over those of a month earlier while lard showed a slight decrease. *Buyers have shown much resistance to higher prices or to any attempt on the part of packers to pass on the processing tax on hogs. There was an effort early in the month to do this but with little success.*" (Italics ours. R. 533, 297)\*

Similar market action is also shown by Mr. Morgan's figures as to prices realized by Cudahy from week to week (R. 453). If the entire inventory had been sold during the week beginning November 13, 1933, at the actual prices for which Mr. Morgan found Cudahy was then selling its

\* The rate then in effect for processing tax was the same as for the floor stocks tax and was fifty cents per cwt. live weight for hogs (R. 4, 21).

products, the inventory would have sold for only \$42,209.42 more than it would have sold for on November 4, 1933, before the imposition of the tax. In other words, it would have failed to recoup the tax by \$241,377.01. At Record 453 the prices realized by petitioner throughout the liquidation periods as found by Mr. Morgan are set forth. At Record 76 is stated the total value of the inventory on November 4, as determined by Mr. Morgan. Appendix A hereto is a calculation predicated on those two exhibits showing how the \$42,209.42 is arrived at.

The trial court made no fact finding of the precipitous decline in market prices following November 6, 1933, because it was persuaded that it was without legal significance. The above facts are, however, unimpeached and uncontroverted.

Beginning about the 1st of October in each year, the new crop of hogs begins to reach the market and ordinarily during the last quarter of the year there is a gradual decline in the prices of hog products as a whole. Such a decline as to hog products occurred in the year 1933. (R. 194, 393). But the price of smoked hams which constituted the great bulk of the inventory in question advanced in that season almost as often as they decline. (R. 192). The gradual decline in hog products as a whole was interrupted by the sharp rise in market prices which occurred on November 6, 1933, most of which, as above noted, was promptly lost when the prices precipitously fell. This precipitous rise and decline was without precedent (R. 195—Price record of hog products compiled by Department of Agriculture). Following the precipitous decline, a gradual decline set in (R. 214). This precipitous rise and decline which interrupted the gradual seasonal decline is reflected in Mr. Morgan's calculations as to Cudahy particular inventory with the result that the prices received for the inventory items sold during the short-lived, abnormal

bulge and the prices received for inventory items sold during the remainder of the liquidation period, when the great bulk of the inventory was finished and sold, produced \$50,913.85 more than the inventory would have produced at the prices prevailing on November 4, 1933.

Mr. Morgan, on behalf of the Government, determined that if the same inventory had been liquidated over the same period in each of the years 1931 and 1932, the Company would have sustained substantial losses; whereas, as actually liquidated in the year 1933, there was an enhancement in value (R. 366). The implication was that the more favorable performance in 1933 was due entirely to the incidence of the tax.

Both Dr. Lutz and Dr. Coulter, on behalf of the petitioner, testified that the years 1931 and 1932, as well as the greater part of 1933, were abnormal as to business conditions of all kinds and marked the bottom of the depression, but that recovery began sometime in 1933, when some of the indices began to move back. They said the recovery was due to a number of governmental activities, which they described in some detail, and which they concluded provided stimuli resulting in general recovery in the wholesale price index, which was not limited to commodities taxed (R. 338-342) and which resulted also in an increase in the national income and in the prices of all meats (R. 346-348). Dr. Coulter said that the years 1931 and 1932 were in no way comparable, and if any comparison were to be made, a ten-year base from 1920 to 1930 should be employed, but that, as a result of all of the governmental measures mentioned, supply and demand in the pork industry and the prospective purchasing power and monetary values were so changed that the entire situation late in the year 1933 was different from that which obtained in 1932, or even during any normal year (R. 418).

They concluded that if the seasonal decline in the last

quarter of the year 1933 was less than during that period in the years 1931 and 1932, it was due to the recovery measures and to the general upswing in the prices of all commodities which occurred in 1933. Their testimony stands uncontradicted.

Further uncontradicted evidence on behalf of the petitioner showed that its average spread based on hogs acquired in August, September and October and on all hog products sold out in November, December and January averaged 3.24 for the ten years 1921 to 1930, and for the years 1931 and 1932, 2.69 and 2.27, respectively, and for the year 1933, 3.12. During the same ten-year period the statistics of the Department of Agriculture (R. 192) relating to smoked hams, the chief item in petitioner's inventory, shows that the average price of smoked hams during the last quarter of each year increased in four out of 10 years, but that there is a gradual, steady decline in prices shown by the statistics relating to all hog products, both fresh and cured even in those four years (R. 195).

The respondent did not request, nor did the trial court make, any finding of fact that the difference in liquidating performance during the year 1933, as compared with the years 1931 and 1932, was due to the incidence of the tax.

Further facts which we regard as irrelevant and immaterial, but to which we refer because they are mentioned in the opinion of the Circuit Court of Appeals are:

The Government put in evidence two bulletins issued by the petitioner to its branch managers containing instructions relating to "future delivery orders" as to which they were told that the contracts were to be stamped in a prescribed way to indicate that the buyers agreed to pay all taxes imposed upon the goods by any Federal Farm Relief or similar law then or thereafter enacted. It appeared from one of the bulletins that they were afterwards told "to discontinue the use of the statement as

the necessity for its use has disappeared with knowledge of what the processing and floor stocks taxes are. On any sale of pork products from now on with full knowledge of what taxes we will have to pay, the price charged should be sufficient to insure us a reasonable profit over and above the taxes." The bulletins on their faces have to do solely with contracts for future delivery, in relation to which no tax refund is claimed. Products so sold were not sold at the market. The price was prescribed in the contract and the tax was added to the price. Credit was allowed by the petitioner for floor stocks taxes collected in such transactions (R. 48, 171, 172, 217), and its evidence to this effect is uncontradicted.

After the tax was proclaimed by Mr. Wallace and on October 23, 1933, an issue of the National Provisioner contained the following editorial comment:

"The market appears to be in a stronger position on the entire line of product today and buyers apparently showing less resistance to higher price levels. Market prices are advancing all along the line, in anticipation of floor taxes. The processors naturally desire to avoid losses due to this taxation and to establish market values to overcome floor taxes, and the early demand today would indicate fairly good progress in this direction. Offerings are very moderate on green joints today and firmly held at previous week's closing figures; inquiries fairly good."

### **Basis of Jurisdiction.**

On December 10, 1945, the United States Circuit Court of Appeals for the Seventh Circuit filed its opinion affirming the judgment of the United States District Court (R. 493). Appellant (petitioner herein) filed its petition for rehearing (R. 503), which was denied January 15, 1946 (R. 527), the court rendering a separate opinion (R. 525).

Thereafter, on the 22nd day of January, 1946, the mandate of the United States Circuit Court of Appeals was issued to the lower court (R. 527).

As this petition for a writ of certiorari is presented within three months of January 15, 1946, having been filed April 15, 1946, it is presented in due time.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stats. 938, 28 USCA, Sec. 347 (a).

### QUESTIONS PRESENTED.

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1. Was there a waiver by the Commissioner of Internal Revenue of the requirement that all evidence relied upon in support of the claim for refund shall be clearly set forth under oath?

2. Are the findings of fact, all of which are conceded to be correct, together with the undisputed evidence on which no findings of fact have been made, sufficient to support conclusion of law No. 2, "that the evidence is insufficient to establish to the satisfaction of the court that plaintiff has borne the burden of the amount of the floor stocks taxes paid by it and that it has not been relieved thereof nor reimbursed therefor nor shifted such burden directly or indirectly?" (R. 473)

3. If conclusion of law No. 2 is not intended to affirmatively state that the petitioner has shifted the burden of the amount of the floor stocks taxes, but means that after full proof of all available facts has been made the trial court is unable to say whether the burden of the floor stocks taxes has or has not been shifted, but that nevertheless recovery should be denied, is not Section 902 so construed in violation of the Fifth Amendment of the Constitution of the United States?

REASONS FOR GRANTING THE WRIT.

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The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. The important question as to the power of the Commissioner to waive defects in the manner in which proof in support of a claim shall be furnished to him and if he has such power, what action constitutes such a waiver, has not been made clear by this Court in the recent case of *Angelus Milling Co. v. Commissioner*, 65 Sup. Ct. 1162, nor in its prior decisions.

2. The decision of the United States Circuit Court of Appeals is probably in conflict with the decision of this Court in the case above cited.

3. The decision in this case disregards the ruling of the Supreme Court in *Webre Steib Co. v. Commissioner*, 65 Sup. 578, and conflicts with the decision of the fourth Circuit in *Arkwright Mills v. Commissioner*, 139 Fed. 2nd 454, in that it assumes that if the prices were increased by the amount of the tax, the burden of the tax must have been shifted even though the uncontradicted evidence shows that the rise was not maintained.

4. If the Court means by conclusion of law No. 2 that when it cannot be determined from all the pertinent facts whether the burden of the tax has or has not been shifted the claimant cannot recover because it has not been established to the satisfaction of the court that claimant bore the burden, then Section 902, as so construed, is unconstitutional and such a construction is contrary to the decision of this Court in *Anniston Manufacturing Company v. Davis*, 57 Sup. Ct. 816.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

VINCENT O'BRIEN,

JOHN MERRILL BAKER,

*Attorneys for Petitioner.*

## APPENDIX A

## CUDAHY PACKING COMPANY

## INVENTORY VALUE WEEK ENDED NOVEMBER 18, 1933

## Sold Through Car Routes

| Article                  | Weight<br>(Lbs.) | Price<br>Per CWT<br>11-18-33 | Value        | Weight<br>(Lbs.) | Price<br>Per CWT<br>11-18-33 | Value          | Weight<br>(Lbs.) | Price<br>Per CWT<br>11-18-33 | Value          |
|--------------------------|------------------|------------------------------|--------------|------------------|------------------------------|----------------|------------------|------------------------------|----------------|
| Fresh Meats .....        | 827,748          | \$ 7.74                      | \$ 64,067.70 | 4,125,351        | \$ 7.68                      | \$ 316,826.96  |                  |                              | \$ 390,894.66  |
| Smoked Hams .....        | 2,058,160        | 12.61                        | 259,533.96   | 8,764,091        | 11.70                        | 1,025,395.65   |                  |                              | 1,294,982.63   |
| Bacon .....              | 1,489,348        | 13.63                        | 202,998.13   | 4,018,970        | 13.05                        | 524,475.59     |                  |                              | 727,473.72     |
| Other Smoked Meats ..... | 218,378          | 10.05                        | 21,946.99    | 2,169,827        | 9.31                         | 202,010.89     |                  |                              | 223,957.88     |
| Dry Salt Meats .....     | 648,678          | 7.73                         | 50,142.81    | 4,329,606        | 7.89                         | 341,605.91     |                  |                              | 391,748.72     |
| Lard .....               | 291              | 8.18                         | 23.80        | 1,155,241        | 8.24                         | 95,191.86      |                  |                              | 95,215.66      |
| Cooked Meats .....       | 112,561          | 21.22                        | 23,885.44    | 978,162          | 21.45                        | 209,815.75     |                  |                              | 293,701.19     |
| Dry Sausage .....        | 279,094          | 15.31                        | 42,729.29    | 1,765,299        | 15.14                        | 267,266.27     |                  |                              | 309,995.56     |
| Other Sausage .....      | 46,037           | 10.63                        | 4,921.36     | 244,547          | 10.73                        | 26,239.89      |                  |                              | 31,161.25      |
| Totals .....             | 5,680,295        |                              | \$670,249.50 | 27,551,094       |                              | \$3,008,831.77 |                  |                              | \$3,679,081.27 |

Sales Value of Inventory at prices during week ending 11-18-33. \$3,679,081.27

Sales Value of Inventory 11-4-33. .... 3,636,871.85

Profit ..... \$ 42,209.42





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*Respondent.*

---

**BRIEF IN SUPPORT OF PETITION FOR A WRIT OF  
CERTIORARI.**

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**STATEMENT OF THE CASE.**

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The essential facts of the case are stated in the accompanying petition for writ of certiorari.

**Jurisdiction.**

The basis of the jurisdiction of this Court is shown in the accompanying petition.

**Opinions Below.**

The initial opinion of the United States Circuit Court of Appeals is to be found at page 494 of the record and its opinion on petition for rehearing at page 525 of the record.

### SPECIFICATION OF ERRORS.

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Petitioner states that the United States Circuit Court of Appeals for the Seventh Circuit erred:

(a) In sustaining conclusion of law No. 1, reached by the trial court that the claim for refund does not comply with the statute and is insufficient to support the jurisdiction of the United States District Court in that it contains no evidence from which it can be determined whether or not the petitioner shifted the economic burden of the tax.

(b) In sustaining the trial court's conclusion of law No. 2 that the evidence is insufficient to establish that the petitioner bore the burden of the amount of the floor stock tax paid by it and that it has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly.

(c) In failing to hold on the fact findings as made and on the uncontradicted evidence as to which no fact findings were made that the plaintiff bore the burden of the amount of the floor stocks tax paid by it, and that it has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly.

(d) In the alternative, in failing to hold that it is inherently impossible to determine upon all the facts whether the burden of the tax was borne or shifted, and in failing to conclude as a matter of law that the petitioner in such event is entitled to recover.

## ARGUMENT.

## I.

**The Circuit Court of Appeals Was in Error in Holding That the District Court Was Without Jurisdiction on the Authority of the Decision of This Court in *Angelus Milling Co. v. Commissioner*, 65 Sup. Ct. 1162.**

It is conceded that the claim for refund in the case at bar was defective in that it failed to contain in Schedule D all of the evidence on which the claimant relied to show that the burden of the tax was not shifted. The claim did contain evidence that the burden of the tax was not shifted in the legal sense, although it contained no evidence as to the economic shifting of the burden thereof. The information called for by all schedules other than D was incorporated in the claim.

In a footnote in the decision of this Court in the *Angelus* case the Court observed, in reference to the original claim filed on behalf of Niagara Falls Milling Co. and Angelus Milling Co.:

“The only information furnished in these claims is the name and address of the joint claimants and a statement of the dates and amounts of the tax payments made by Niagara Milling Co.”

Again, in speaking of the amendment to that claim which was made by and on behalf of the Angelus Milling Co., this Court said:

“This claim was submitted on Form PT 79. It failed to give the information required by the form and regulations, containing merely an apportionment between Angelus and Niagara of the three earlier claims.”

Thus, there was a complete failure on the part of the plaintiff to furnish any evidence whatsoever in support of its claim. Nevertheless, the Court, without needless elaboration, concluded that "there is nothing in what Congress has explicitly commanded to bar the claim."

We assume that the reason for the Court's conclusion is that although the claim did not comply with the regulations, as Section 903 of the statute says it must, nevertheless, the Commissioner had the power to waive the defects because the requirements of Section 903 are merely procedural, although he is without power to dispense with the substantive condition to recovery set forth in Section 902.

In any event, on the facts in that case, the Court did hold that the Commissioner had the power to waive the defects in the claim there involved.

The question, therefore, is: what action by the Commissioner amounts to a waiver? In the *Angelus* case the Court holds that it must be clear that the Commissioner has seen fit to dispense with his formal requirements and to examine the merits of the claim. The Court also seems to hold that the Commissioner can investigate the merits and still deny the claim for form but that he cannot do so after he has investigated the merits and taken action upon the claim. Surely, the action which, coupled with the investigation, amounts to a waiver may fall short of rendition of a decision upon the merits because a decision on the merits was not the basis for the holding of waiver in any of the cases cited in the *Angelus* decision.

Although a ruling on the claim on the merits evidently is not necessary to constitute a waiver, it is not made clear what action it is that must be coupled with the investigation to evidence an intention to waive. Whatever the shading may be, it seems to us that the facts in the case at bar meet any prerequisite which this Court intended to lay down.

In the case at bar waiver is shown by the Commissioner's acceptance of the petitioner's invitation to send his auditors to examine its books and records pertaining to the floor stocks tax claim and by his conducting hearings on the merits of the claim after the investigation was completed without requesting further data in any other form. That his attention was "focused on the merits" of the claim and that he was "preoccupied" with the particular claim and controversy is shown by the Government's written admission filed in the District Court (R. 147 and 148) and by the memorandum which the Commissioner's representative submitted to the petitioner at the conclusion of the hearings (R. 157).

Thus, petitioner sustained its "burden of showing that the Commissioner by examining the facts of petitioner's claim in order to determine the merits dispensed with the exactions of the regulations."

In the *Angelus Milling Co.* case the Court found from the facts in evidence that the Commissioner's attention and investigation was not directed to the particular claim of Angelus Milling Co., but to the separate claim of Niagara Milling Co., and that the facts, if any, in relation to the former claim, therefore came to him only in a roundabout fashion. Furthermore, in the *Angelus* case the claim of waiver was predicated solely upon the investigation and not on any further action thereafter taken by the Commissioner indicative of his intention to consider the claim on the merits.

We, therefore, respectfully submit that the Circuit Court of Appeals was in error in concluding that the District Court was without jurisdiction.

## II.

**The Circuit Court of Appeals in Reaching its Decision on the Merits of This Case Disregarded the Ruling of the Supreme Court in *Webre Steib Co. v. Commissioner*, 65 S. Ct. 578.**

The basic error in the trial court's conclusion and in the initial opinion of the Court of Appeals is that no cognizance was taken by either court of what occurred to market prices *after* the imposition date of the tax. As we have shown, the increase in market prices was not maintained throughout the period during which the inventory items were liquidated but, on the contrary, was for the most part promptly lost. One would never learn this from an inspection of the findings of the District Court, nor from an inspection of the initial opinion of the Court of Appeals. The fact is that the respondent persuaded both courts that this circumstance, although factually true, was without legal significance.

The decision of this Court in *Webre Steib v. Commissioner*, 65 S. Ct. 578, had not been rendered prior to the entry of the judgment in the District Court. At page 583 of its opinion in that case this Court said:

“\* \* \* There is no evidence to show how far petitioner succeeded in its effort to pass the tax on except for the evidence that there was a general rise in the market on a date some months before petitioner's processing began. The margins are some evidence that the price may not have responded continuously to the efforts to shift the tax.”

Reference to the more detailed statement of facts in the same case in the Court of Appeals, 140 Fed. (2d) 768, will disclose, at page 771, that the increase in market prices “became effective as of the moment the processing tax was

imposed to cover the amount of the tax." Because in the *Webre Steib* case there was conflicting evidence as to "whether the price responded continuously", the case was remanded so that the evidence might be weighed and a finding be made.

In the case at bar, as we have shown, there is no conflict in the evidence. The undisputed evidence is that shortly after the rise there was a precipitous fall which was due to the refusal of the public to absorb the tax. It is clear from the opinion of this Court in that case that what happened to the prices after November 6, 1933, is not immaterial but is controlling.

As was said by the District Court in *Arkwright Mills v. United States*, 49 Fed. Supp. 970:

"Defendant's next argument is that under the formula quoted from the brief in the *Anniston* case, we should look to quoted prices on August 1, which were approximately the July 31 prices plus the tax, and say that on August 1 plaintiff raised its prices by the amount of the tax, thereby shifting the burden of the tax, and that no subsequent reduction in price could be attributed to the tax, but all must be attributed to the competitive market. This is fallacious in that it ignores realities. Whether a tax burden is absorbed or shifted must be judged by what happened, not by what was hoped for. If the market refused to take goods at pre-tax prices plus tax, and prices had to come down to pre-tax prices plus part of the tax, then the burden of only that part was shifted to the purchasers. They cannot be said to have borne the burden of anything they refused to pay for."

Nevertheless, in its initial opinion the Court of Appeals makes no mention of the *Webre Steib* case, nor of the decision of the United States District Court in *Arkwright Mills v. United States*, 49 Fed. Supp. 970, nor of the decision of the Court of Appeals for the Fourth Circuit

affirming it in 139 Fed. (2d) 454, which are in point on the merits of the instant case. Nor does it point to any evidence that the initial rise was maintained for any time past November 6, 1933. No comment is made on the uncontradicted evidence which shows that the price was not maintained.

Rather, the Court of Appeals erroneously took the view that the petitioner was questioning the fact finding of the trial court that on the day of the incidence of the tax the prices rose by the amount thereof. Having alluded to some of the evidence which supported the finding to that effect, the court concluded that there was substantial evidence to sustain the finding and that it could not be disturbed, and thus affirmed the judgment without ever getting to the merits of the case.

The supplemental opinion of the Circuit Court of Appeals rendered after the petition for rehearing was filed attempts to cure the error of the trial court in failing to make a finding as to what happened after the initial rise in prices on November 6, 1933, and to avoid a conflict with the *Webre Steib* case by saying that although the court made no finding as to what followed the initial rise in prices, it is reasonable to assume that it considered such evidence and remained convinced that the petitioner had shifted the burden of the tax.

But the provision of the Rules of Federal Procedure that the trial court shall make findings of fact must mean the specific findings on which the court's legal conclusions rest.

Furthermore, even if it is permissible to assume that the trial court considered the evidence of what occurred in the market after November 6, 1933, it could not have weighed that evidence and resolved its findings against the petitioner as the Circuit Court of Appeals assumed it did and reached the conclusion that the burden of the entire tax had been shifted. The fact that the rise in value of the inventory

on November 6, in the full amount of the tax, was precipitously lost and that that rapid fall in prices could not be attributed to a usual, gradual seasonal decline in the value of the inventory items was established by uncontroverted evidence. The necessary legal conclusion from that evidence is that the subsequent decline was due to the refusal of the public to absorb the entire tax.

### III.

**If the District Court Meant by Its Conclusion of Law No. 2 That it Could Not be Determined From All of the Evidence Whether Petitioner Had or Had Not Borne the Burden of the Tax, Then Its Denial of Recovery is Contrary to the Holding of This Court in *Anniston Mfg. Co. v. Davis*, 57 S. Ct., 816.**

Petitioner discharged its burden of producing proof of its operations and course of business and all facts in its possession bearing upon the questions at issue. It likewise made available to the Government all data which it desired and most complete examinations and audits were made by the Government. If by conclusion of law No. 2 the trial court means that on all of the facts before it was impossible to determine whether the burden of the tax had or had not been shifted, then, under the authority of *Anniston Mfg. Co. v. Davis*, 57 S. Ct. 813, it should have given judgment for the petitioner.

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We respectfully submit that certiorari should be granted to the end that this Honorable Court may settle the questions involved.

Respectfully submitted,

VINCENT O'BRIEN,  
JOHN MERRILL BAKER,  
*Attorneys for Petitioner.*



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No. 1114

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**In the Supreme Court of the United States**

OCTOBER TERM, 1945

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THE CUDAHY PACKING COMPANY, a MAINE  
CORPORATION, PETITIONER

THE UNITED STATES OF AMERICA

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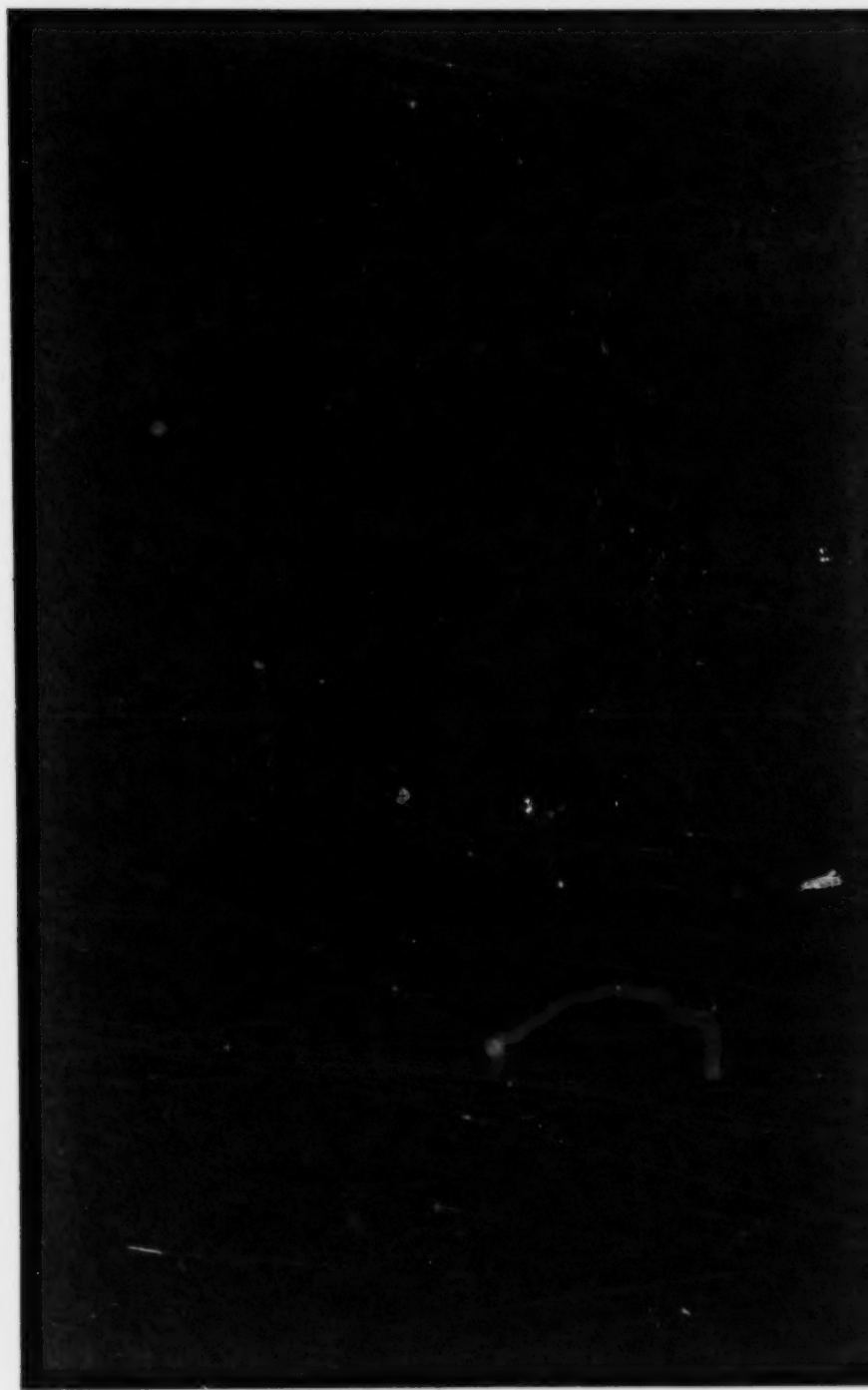
ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1945

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No. 1114

THE CUDAHY PACKING COMPANY, A MAINE  
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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the District Court on motion for summary judgment is reported in 37 F. Supp. 563 and the opinion of the Circuit Court of Appeals on appeal from that decision is reported in 126 F. 2d 429. The findings of fact and conclusions of law of the District Court (R. 471-473) are reported in 56 F. Supp. 753. The opinion of the Circuit Court of Appeals (R. 494-501) on appeal from the judgment thereupon entered is reported in 152 F. 2d 831. The opinion of the

Circuit Court of Appeals on petition for rehearing (R. 525-527) is not reported.

#### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 10, 1945. (R. 502.) A petition for rehearing was filed on December 26, 1945 (R. 502) and denied on January 15, 1946 (R. 527). The petition for a writ of certiorari was filed April 15, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

1. Whether the District Court was without jurisdiction in view of the fact that the taxpayer's claim for refund failed to comply with requirements of Section 903 of the Revenue Act of 1936, as amended.

2. Whether the taxpayer established, as required by Section 902 of the Revenue Act of 1936, that it bore the burden of the floor stocks taxes which it seeks to recover.

#### STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.—No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of

the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

\* \* \* \* \*

(7 U. S. C. 644.)

SEC. 903 [as amended by Section 405, Revenue Act of 1939, c. 247, 53 Stat. 862].  
 FILING OF CLAIMS.—No refund shall be made or allowed of any amount paid by or collected from any person as tax under the

Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C. 645.)

Treasury Regulations 96, promulgated under the Revenue Act of 1936:

ARTICLE 202. FACTS AND EVIDENCE IN SUPPORT OF CLAIM.—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

\* \* \* \* \*

## STATEMENT

The complaint alleges (R. 3-20) payment by the taxpayer of floor stocks taxes under the Agricultural Adjustment Act in the sum of \$308,-182.08 (R. 5, par. 7); that the taxing provisions of the Agricultural Adjustment Act were unconstitutional and void (R. 16-17, par. 21); that the taxpayer filed a claim for refund on June 28, 1937 (R. 8, par. 15), which had not been acted upon by the Commissioner of Internal Revenue when this action was commenced; more than 18 months later (R. 8, par. 17); and that the taxpayer has not shifted the burden of the tax by billing any amount of it to any vendee as a separate item or by adding to or including in its prices any identifiable amount of the tax or by reducing the prices paid by it for raw materials (R. 16, par. 20).

Upon these allegations it is averred (R. 16-17, par. 21) that the taxpayer has not shifted the burden of the tax and that, if Section 902 of the Revenue Act of 1936 requires proof of facts other than those alleged, it violates the Fifth Amendment to the Constitution of the United States and is unconstitutional and void.

The Government's answer (R. 20-23) put in issue allegations with respect to the burden of the tax and impossibility of proof.

Upon a motion for summary judgment by the taxpayer, the District Court upheld the taxpayer's contention that Section 902 of the Rev-

enue Act of 1936 required proof of no facts beyond those alleged in the complaint and granted judgment in favor of the taxpayer. 37 Supp. 563.

This judgment was reversed by the Circuit Court of Appeals (126 F. 2d 429) which held that the statute required the taxpayer to establish that it had not shifted the economic burden of the tax and remanded the cause to the District Court for further proceedings. The taxpayer then amended its complaint (R. 47-48) to allege, in the language of the statute, that it had not shifted the burden of the tax sought to be recovered and, in the alternative (R. 48), "that the available facts relating to plaintiff's operations and course of business, full proof of which will be adduced on the trial of this cause, afford no basis for any determination as to the shifting of the burden of the tax." This allegation was later amended by the following addition (R. 51):

, and plaintiff further avers that, if said Section 902 is so construed or interpreted as to preclude recovery by the plaintiff notwithstanding such impossibility of determination after full proof of said facts has been made, then and in that case said Section 902 violates the Fifth Amendment of the Constitution of the United States and is unconstitutional and void in that it requires proof impossible for plaintiff to make and deprives plaintiff of its property without due process of law. In that case plaintiff is entitled to recover from defend-

ant the said principal amount of its claim with interest, under the provisions of said Sections 3770, 3771, and 3772 of I. R. C.

The answer was amended to meet the taxpayer's amendments (R. 49) and put in issue the allegations with respect to the burden of the tax and impossibility of proof.

After trial, the District Court found (R. 471-473) that the claim for refund was insufficient to support the jurisdiction of the District Court because it contained no evidence from which it could be determined that the taxpayer had borne the burden of the tax.

The District Court further found (R. 473) that the evidence introduced by the taxpayer upon the trial was insufficient to establish that it had borne the burden of the tax.

The Circuit Court of Appeals held (R. 494-501) that the decision of the District Court was correct on both points and affirmed.

#### ARGUMENT

1. Section 903 of the Revenue Act of 1936, as amended, *supra*, provides that no refund of any amount paid as tax under the Agricultural Adjustment Act shall be allowed unless a claim for refund is filed in which all evidence in support of the claim is clearly set forth under oath. The claim in this case (R. 24-45) merely stated that it could not be ascertained from the taxpayer's records whether or not it had shifted the burden

of the tax. Such statements have been held insufficient to meet the requirements of the statute. *18th Street Leader Stores v. United States*, 142 F. 2d 113 (C. C. A. 7th); *New York Handkerchief Mfg. Co. v. United States*, 142 F. 2d 111 (C. C. A. 7th); *Weiss v. United States*, 135 F. 2d 889 (C. C. A. 7th).

The taxpayer urges (Br. 21) that the infirmity of the claim, which it concedes (Br. 19), was waived by the Commissioner by examining the taxpayer's books and records. The claim for refund, however, was never rejected by the Commissioner and, as the Circuit Court of Appeals points out (R. 526), there is nothing to indicate that the Commissioner by investigating the taxpayer's books intended to waive the right to reject the claim for defects in form. This Court in *Angelus Milling Co. v. Commissioner*, 325 U. S. 293, held that evidence of such a waiver should clearly and unmistakably establish an intention on the part of the Commissioner to dispense with the formal requirements of the statute. The decision of the Circuit Court of Appeals, so far from being in conflict with that in the *Angelus Milling Co.* case, follows it. It correctly sustained the District Court's ruling that it was without jurisdiction.

2. The Circuit Court of Appeals also correctly decided that the District Court was right in dismissing the complaint for the taxpayer's failure of proof. It was for the taxpayer to establish to the satisfaction of the trial court that

it had borne the burden of the tax. (Section 902, Revenue Act of 1936, *supra*; *Webre Steib Co. v. Commissioner*, 324 U. S. 164, 171.

The record reveals that the market prices for hog products, at which the taxpayer sold its products, were increased upon the announcement of the imposition of the tax (R. 248-249) and that on the date the tax was imposed prices of all meat products were increased by at least the amount of the tax. In addition, the Government also proved (R. 366) that when the tax was imposed the taxpayer was able to reverse a normal seasonal decline in the sales value of its products to an extent greatly in excess of the amount of the floor stocks taxes paid by it and thus to shift the entire burden of the tax.

The District Court's finding that the evidence introduced by the taxpayer upon the trial was insufficient to establish that it had borne the burden of the tax was made after that court had weighed all the evidence. The Circuit Court of Appeals re-examined the evidence and found no error in the District Court's determination.

The decision of the Circuit Court of Appeals is not in conflict with *Webre Steib Co. v. Commissioner*, 324 U. S. 164, as the taxpayer asserts. (Pet. 14.) That case involved the presumption contained in Section 907 of the Revenue Act of 1936 with respect to refunds of processing taxes. There the proof only showed that the taxpayer had increased its prices at the incidence of the

tax; here, as pointed out above, the Government went further and established the fact that the taxpayer was enabled to reverse a normal seasonal decline in its prices and thus shift the entire tax burden.

Nor is the decision of the Circuit Court of Appeals in conflict with *United States v. Arkwright Mills*, 139 F. 2d 454 (C. C. A. 4th). In that case the taxpayer added the tax to its prices and compared its actual selling prices to those thus established. From its failure to obtain these prices thus increased, the taxpayer argued that it had to this extent borne the burden of the tax. The Government offered no proof, as here, and the court held that the *prima facie* case made out by the taxpayer had not been rebutted.

#### CONCLUSION

The decision of the Circuit Court of Appeals was correct and there is no conflict between it and the decisions of this Court or of any Circuit Court of Appeals. The petition for certiorari should therefore be denied.

Respectfully submitted.

J. HOWARD McGRATH,  
*Solicitor General.*

SEWALL KEY,  
*Acting Assistant Attorney General.*

ROBERT N. ANDERSON,  
FREDERIC G. RITA,  
*Special Assistants to the Attorney General.*

MAY 1946.

*End*

